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Supreme Court of the United States

October Term, 1959

No. ~~1078~~ 156

BANTAM BOOKS, INC.,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
Question Presented	2
Statute Involved	2
The Facts	3
Reasons Relied Upon for Allowing the Writ	6
The Words "Clear, Conspicuous Type" and "Position Adapted Readily to Attract the Attention of a Prospective Purchaser" Are Unconstitutionally Vague	7
Conclusion	15
APPENDIX:	
Opinion of United States Court of Appeals, for the Second Circuit	1a
Final Decree Order Enforcing Order to Cease and Desist	11a

Table of Authorities

	PAGE
CASES:	
Bird v. United States, 241 F. 2d 516 (1 Cir. 1957)	15
Burstyn v. Wilson, 343 U. S. 495 (1952)	11
Federal Trade Commission v. Raladam Co., 283 U. S. 643 (1931)	14
M. Kraus & Bros., Inc. v. United States, 327 U. S. 614 (1946)	10
New American Library of World Literature, Inc. v. Federal Trade Commission, 213 F. 2d 143 (2 Cir., 1954)	9
Scull v. Commonwealth of Virginia, 359 U. S. 344 (1959)	11
Smith v. State of California, 80 Sup. Ct. 215 (1959)	11
United States v. Latrobe Construction Co., 246 F. 2d 357 (8 Cir., 1957)	15
United States v. Vater, 259 F. 2d 667 (2 Cir., 1958)	15
Winters v. New York, 333 U. S. 507 (1948)	10, 11
STATUTES:	
15 U. S. C. Sec. 45(b)	2
15 U. S. C. Sec. 45(c)	2
28 U. S. C. Sec. 1254(1)	2

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Second Circuit which denied a petition to review a cease and desist order of the Federal Trade Commission with respect to notices of abridgment and retitling of books offered for sale by Petitioner, and affirmed said order.

Opinion Below

The opinion below appears at App. 1a to 10a * and is reported at 275 F. 2d 680. The Initial Decision of the Hearing Examiner which was adopted by the Federal Trade Commission appears at PR. 8a-21a.

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* The following designations to the record are used herein:

"App."—Opinion and decree below, comprising pages 1a to 12a of the appendix to this petition.

"PR."—Printed record below, comprising pages 1a to 51a of the appendix to Petitioner's brief in the Court below.

"T."—Transcript of the hearing before the Hearing Examiner.

"C. Ex."—Commission's Exhibits.

Jurisdiction

The decree of the Court of Appeals is dated March 21, 1960 and was entered on March 21, 1960. It appears at App. 11a to 12a.

The jurisdiction of this Court is invoked under 15 U. S. C., Sec. 45(c) and 28 U. S. C., Sec. 1254 (1).

Question Presented

Whether the order of the Federal Trade Commission requiring Petitioner to set forth notices of abridgment and of retitling of its books in "clear, conspicuous type" in a "position adapted readily to attract the attention of a prospective purchaser," is so vague and indefinite as to violate Petitioner's constitutional rights under the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

Circuit Judge Moore dissented from the holding of the majority that Petitioner's rights are not violated by the order of the Commission.

Statute Involved

The statute involved is Sec. 5(b) of the Federal Trade Commission Act, 15 U. S. C., Sec. 45(b), which insofar as here pertinent provides:

> "Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a

> complaint stating its charges in that respect * * *. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served * * * an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice."

The Facts

Petitioner is a New York corporation engaged in the publication and sale of paper-bound books. These books are essentially reprints of books previously published in hard cover by other publishers. Over 90% of the capital stock of Petitioner is owned in equal amounts by The Curtis Publishing Company of Philadelphia, Pa., and Grosset & Dunlap, Inc., of New York, N. Y. (T. 136-137).

From the time Petitioner commenced doing business in 1945 to the institution of this proceeding in May, 1957, it published over 1,100 titles, amounting to more than 350,000,000 books.

During that entire period no complaint was made to Petitioner by any member of the public with respect to abridgments or changes of title (T. 33).

During 1955 Petitioner published 128 titles, which included 7 abridgments and 8 changes of title.

During 1956 Petitioner published 143 titles, which included 7 abridgments and 15 changes of title.

During 1957 (between January 1 and April 30) Petitioner published 52 titles, which included 4 changes of titles and no abridgments (T. 6, 34).

Hearings were held before a Hearing Examiner, who on July 25, 1958 issued his Initial Decision. The Commission, in its order dated November 24, 1958, adopted that Decision and thereby found that Petitioner "has not adequately disclosed the fact that certain of its published books are abridgments of the original publications and that certain of its other books are reprints of books originally or previously published under different titles than those used by respondent" (i.e., Petitioner) (PR. p. 19a).

Abridgments

The Hearing Examiner, in the Initial Decision, found that 5 of Petitioner's titles made inadequate disclosure of abridgment. These are:

THE KILL (C. Ex. 2)
THE NINE WRONG ANSWERS (C. Ex. 3)
THE TIME OF THE GRINGO (C. Ex. 6)
THE AUTOBIOGRAPHY OF BENVENUTO CELLINI (C. Ex. 19)
THE COUNT OF MONTE CRISTO (C. Ex. 42)

However, as to each of the first 4 of these books, the Hearing Examiner found that there appeared on the front cover, notations as follows:

THE KILL—"NEW ABRIDGED EDITION"
THE NINE WRONG ANSWERS—"NEW ABRIDGED EDITION"
THE TIME OF THE GRINGO—"NEW EDITION, AUTHORIZED ABRIDGMENT"
THE AUTOBIOGRAPHY OF BENVENUTO CELLINI—"New Abridged Edition" (stated by the Examiner to be "in small but reasonably legible white type") (PR. pp. 10a-12a)

As to THE COUNT OF MONTE CRISTO (C. Ex. 42), the Hearing Examiner found that no indication has been made

of abridgment. However, the fact is that on the front cover there is clearly printed the legend "A New Translation." Additionally, at the top of the back cover appears the statement "This is the first American translation." Thus a prospective purchaser is definitely apprised that Petitioner's book is *not* an exact republication of an existing work. The record shows furthermore that this new translation contains all the essential story material contained in the original French edition (T. 134). Even Dr. Maubrey, the Commission's expert, in referring to Petitioner's edition, testified that "the thing which seems to have been mainly dropped consists of descriptions and landscapes" (T. 51).

Title Changes

With respect to the 27 books involving a change of title published by Petitioner during the period covered by the complaint, the Hearing Examiner refers in his Initial Decision to 5 as not giving adequate disclosure of such retitling. These 5 are:

RAG TOP (C. EX. 25)
TIME: X (C. EX. 9)
MAN FROM TOMORROW (C. EX. 14)
WOMAN DOCTOR (C. EX. 27)
THE SHIPWRECKED (C. EX. 34)

Actually, as to RAG TOP, notice of retitling is set forth three times, to wit: on the cover, on the title page and on the copyright page.

As to TIME: X, notice of retitling is set forth four times, to wit: on the cover, on the title page, on the copyright page and on the last page.

As to MAN FROM TOMORROW, notice of retitling is set forth four times, to wit: On the cover, on the title page, on the copyright page and on the last page.

As to WOMAN DOCTOR, notice of retitling is set forth five times, to wit: on the cover, on the title page, on the copyright page, on the page preceding the blank page just before the first page of text and on the last page.

As to THE SHIPWRECKED, notice of retitling is set forth three times, to wit: on the cover and twice on the copyright page.

The Examiner found in the Initial Decision, adopted by the Commission, that it was Petitioner's practice in the case of changes of title to indicate such changes in three separate places—"on the front cover and on both front and back of the title page" (PR p. 14a). But, as a matter of fact, with respect to the 5 books so condemned, notice of retitling was actually set forth, as shown above, on three of them four times and on one of them five times.

Reason Relied Upon for Allowing the Writ

As stated in the opinion of Circuit Judge Moore, this case raises the fundamental question as to whether "the words 'in clear, conspicuous type' convey a sufficiently clear standard as to what constitutes adequate disclosure so as to enable a publisher to understand what it is to do to comply either with the laws or the Commission's orders." In fact, Judge Moore expressly stated that he "cannot accept the conclusion" that these words convey a sufficiently clear standard (App. 7a).

This same question extends also to the words in the Commission's order in a "position adapted readily to attract the attention of a prospective purchaser".

The question is of great importance to the entire book publishing industry. As Judge Moore stated:

> "• • • the majority concedes that the legends on the covers were 'easy to read', were not 'illegible' and 'in no wise unreadable'. These findings would

naturally lead to the conclusion that the Commission's order has been adequately complied with. But how is the publisher to know? No standards for compliance have ever been suggested. No size of type is specified, no special colors are required, no particular location on the cover or inside pages is directed." (App. 8a)

* * *

"Publishers about to print thousands of copies at considerable cost should not be put in this predicament of uncertainty." (App. 9a)

This is an important question of federal law which has not been, but should be, settled by this Court.

The Words "Clear, Conspicuous Type" and "Position Adapted Readily to Attract the Attention of a Prospective Purchaser" Are Unconstitutionally Vague

This proceeding and the cease and desist order are obviously penal in nature. The proscriptions set forth in such order stem from the prohibition against deceptive acts and practices contained in Section 5(a) of the Federal Trade Commission Act. Yet no explicit and unambiguous objective standard has been set by the Commission so that a publisher, bent on obedience of law, may be adequately informed as to what conduct will be considered in violation so as to bring the penalties of the Act into operation.

Dr. Winick, Petitioner's expert, testified to eleven distinct factors which must be considered "in determining the extent to which a given legend or a given statement or a given collection of printed materials will be visible on a book cover of any kind" (PR. pp. 37a-38a). The Hearing Examiner *accepted* those eleven "characteristics" (PR. p. 51a) which, briefly summarized deal with:

1. legibility of the background against which the material occurs;

2. contrast of the given type against the particular background;

3. illustration as part of the background against which the printed material is read;

4. type face that is employed;

5. length of the given line and the space available at either end of the printed line;

6. spaces between lines;

7. actual spaces between letters in a word and between words in a line;

8. color contrast that is employed;

9. size of type that is used;

10. margins that are employed; and

11. factor of position (PR. pp. 37a-38a).

As to *none* of these factors has the Commission ever expressed itself, other than the vague and indefinite requirement that notice be in "clear, conspicuous type * * * in immediate connection with the title or in another position adapted readily to attract the attention of a prospective purchaser."

If, for example, the Commission had issued a regulation that disclosures of abridgment and retitling should be printed in type of a specific minimum size, or scaled proportionally to the size of the title, such a direction could have been and would have been readily complied with.

Further, with respect to the aspect of location, in the case of *each* one of the nine notices of abridgment and retitling specifically condemned by the Hearing Examiner and the Commission, the Hearing Examiner alluded critically to the fact that such location was either—

near the bottom (THE KILL, PR 10a) or
at the lower left corner (THE NINE WRONG ANSWERS, PR 11a) or

across the bottom (THE TIME OF THE GRINGO, PR 11a), (THE AUTOBIOGRAPHY OF BENVENUTO CELLINI, PR 12a), (RAG TOP, PR 13a), (MAN FROM TOMORROW, PR 13a) or

at the very bottom (TIME:X, PR 13a), (THE SHIPWRECKED, PR 14a) or

at the lower right corner (WOMAN DOCTOR, PR 14a).

As to the matter of location, Petitioner can only be required to set forth notice of abridgment or retitling "• • • in a position adapted readily to attract the attention of a prospective purchaser" (*New American Library of World Literature, Inc.* v. *Federal Trade Commission*, 213 F. 2d 143, 146 (2 Cir. 1954)). Yet, without promulgation by the Commission of any specific rules as to what locations would be deemed *not* "adapted readily to attract the attention of a prospective purchaser", the Commission has condemned Petitioner for having placed its notices of abridgment and retitling at or near the bottom of the front cover. This, the Commission now says, is an "inept selection of location" (PR 15a), although Petitioner's expert Dr. Winick testified without contradiction, that the bottom of the front cover would be one of the locations most likely to attract the attention of a prospective purchaser (PR. 39a; 40a; 42a-44a).

Furthermore, the Court below commented, obviously adversely, on the fact that Petitioner's notices of abridgment were "without use of upper and lower case," (App. 3a, 1st full paragraph). Yet, at no time has there been any expression by the Commission with respect to the relationship between the use of upper and lower case and the requirement of "clear, conspicuous type."

This Court has held that regulations promulgated by an administrative agency under an act of Congress imposing criminal sanctions for a violation of such regulations are governed by the same requirements of definiteness as are

statutes defining criminal action. In the case of *M. Kraus & Bros., Inc.* v. *United States*, 327 U. S. 614, 621-622 (1946), the Court stated:

> "This delegation to the Price Administrator of the power to provide in detail against circumvention and evasion, as to which Congress has imposed criminal sanctions, creates a grave responsibility. In a very literal sense the liberties and fortunes of others may depend upon his definitions and specifications regarding evasion. Hence to these provisions must be applied the same strict rule of construction that is applied to statutes defining criminal action. In other words, the Administrator's provisions must be explicit and unambiguous in order to sustain a criminal prosecution; they must adequately inform those who are subject to their terms what conduct will be considered evasive so as to bring the criminal penalties of the Act into operation. See *United States* v. *Wiltberger*, 5 Wheat. (U. S.) 76, 94-96, 5 L. ed. 37, 42, 43. *The dividing line between unlawful evasion and lawful action cannot be left to conjecture. The elements of evasive conduct should be so clearly expressed by the Administrator that the ordinary person can know in advance how to avoid an unlawful course of action.*" (Italics supplied.)

In dealing with statutes defining criminal conduct, this Court stated in *Winters* v. *New York*, 333 U. S. 507, 515 (1948):

> "The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement. The crime 'must be defined with appropriate definiteness'. *Cantwell* v. *Connecticut*, 310 U. S. 296; *Pierce* v. *United States*, 314 U. S. 306, 311. *There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment.*" (Italics supplied.)

Citing the *Winters* case, this Court stated in *Scull* v. *Commonwealth of Virginia*, 359 U. S. 344, 353 (1959):

> "Certainty is all the more essential when vagueness might induce individuals to forego their rights of speech, press, and association for fear of violating an unclear law."

Also citing the *Winters* case, in *Smith* v. *State of California*, 80 Sup. Ct. 215, 217-218 (1959), this Court said:

> "And this Court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser."

The clear applicability of this doctrine to the case at bar requires no extended discussion.

Mr. Justice Frankfurter's statement in his concurring opinion in *Burstyn* v. *Wilson*, 343 U. S. 495 (1952), is here most apt. In that case this Court held unconstitutional a New York statute which permitted the banning of motion pictures on the ground that they are "sacrilegious." Mr. Justice Frankfurter said (p. 532):

> "Prohibition through words that fail to convey what is permitted and what is prohibited for want of appropriate objective standards, offends Due Process in two ways. First, it does not sufficiently apprise those bent on obedience of law of what may reasonably be foreseen to be found illicit by the law-enforcing authority, whether court or jury or administrative agency. * * *"

We ask this Court to compare the foregoing requirement of definiteness with the nebulous governing tests set forth in the Hearing Examiner's Initial Decision, adopted by the Commission. The Examiner stated: "front cover disclosures were frequently indistinct due to smallness of

type, lack of variance in size of type, inept selection of location on the page and through use of colors affording little contrast with the background against which they appeared" (PR. 14a-15a).

How can a publisher, in the language of Mr. Justice Frankfurter, "bent on obedience of law", know in advance without explicit directive what is deemed by the Commission to be small type on a book cover, or what is lack of variance in size of type?

How can a publisher—"bent on obedience of law"—know in advance what is deemed by the Commission to be apt or inept selection of location?

How can a publisher—"bent on obedience of law"—know what use of color in the Commission's opinion, affords little contrast?

We submit that a publisher—"bent on obedience of law"—is completely at a loss to answer these questions and should not be required to do so at his peril.

The record establishes that in no instance did Petitioner evince a disregard of the law, but rather, Petitioner's compliance with the law has been found wanting in particulars for which no objective standards have ever been enunciated.

We reiterate, it is clear from the foregoing that the cease and desist order herein is unconstitutionally vague.

Circuit Judge Moore disagreed with the majority in their conclusion that there is no merit to this contention. Judge Moore said:

> "Were this case to come before me *de novo* my views would be entitled 'dissenting' and not 'concurring.' However, to follow, and be consistent with, the decisions on the subject in this circuit, I concur in the result. Nevertheless * * * I cannot accept the conclusion that the words 'in clear, conspicuous type'

convey a sufficiently clear standard as to what constitutes adequate disclosure so as to enable a publisher to understand what it is to do to comply either with the laws or the Commission's orders. Nor can I agree that a single trial examiner of the Commission without the aid of any testimony, expert or otherwise, is the one person in the entire judicial and quasi-judicial system best able to comprehend the approach of that non-existent character, the 'average' reader, in his purchase of a 'pocket' book.

Flattered momentarily by the majority's suggestion that judges may be more intelligent and experienced but quickly reduced in scale by the conclusion that it is 'of no moment that we might think the legends sufficient for ourselves' I find myself trying to cope with the answer to 'clear and conspicuous' to whom? Certainly they are to us because the majority concedes that the legends on the covers are 'easy to read,' were not 'illegible' and 'in no wise unreadable.' These findings would naturally lead to the conclusion that the Commission's order has been adequately complied with. But how is the publisher to know? No standards for compliance have ever been suggested. No size of type is specified, no special colors are required, no particular location on the cover or inside pages is directed. Why should a trial examiner decide for or against compliance merely because he concludes that the publishers in printing their books should cater to 'the one or two minute purchaser'? (App. 7a-8a)

• • •

Publishers about to print thousands of copies at considerable cost should not be put in this predicament of uncertainty." (App. 9a)

The simple fact remains that for violation of this cease and desist order Petitioner may be subjected to severe penalties; yet, the order is couched in such vague and indefinite terms as to make it impossible for Petitioner to determine when it is or is not in violation of the order.

Respondent contended in the Court below that the phrase "adequate disclosure" is like the phrases "unfair

methods of competition" and "unfair or deceptive acts or practices" in the Federal Trade Commission Act, as to which latter phrases this Court, in *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643 (1931), stated that they do not admit of precise definition and that their meaning and application must be arrived at by the "gradual process of judicial inclusion and exclusion."

While it may be impossible at the outset to define what constitutes "unfair methods of competition" or "unfair or deceptive acts or practices," once it has been determined that a particular set of circumstances falls within the proscribed area, the order directing the cessation of such methods or acts or practices can and should be specific so as to apprise the person against whom it is directed as to when he will—or will not—be in violation of such order.

We submit that Judge Moore struck at the crux of the situation when he stated:

> "On the other hand, where, as here, 'clear and conspicuous' *can be given more finite measurements, standards of type and print should not be kept vague and indefinite so as to make conformity with the Commission's orders a matter of guesswork by the publisher and possible whim and personal opinion by individual trial examiners.*" (Italics supplied) **(App. 9a)**

In the Court of Appeals, Respondent urged that the question as to the adequacy of the disclosure was not properly before the Court, claiming that it had not been raised below. The Court below did not reach this question because of the majority's conclusion that Petitioner's claim is unfounded on the merits.

There are two answers to Respondent's contention. First, this issue was raised below. The fact is that at the end of Respondent's case before the Hearing Examiner, Petitioner's counsel in moving to dismiss the complaint made the following statement:

> "If the statute required that, if the statute said, there should be not less than such and such a point type, then Bantam would comply. There is no such requirement and the law is clear that before a person commits a—for instance, in criminal law, before he commits a crime, that he must know in advance with definiteness what the requirements are so he may know whether he is disobeying a law or not." (T. 41a)

Secondly, it is not an inflexible rule that an appellate court may not consider an issue not raised below.

See *United States* v. *Latrobe Construction Co.*, 246 F. 2d 357, 362 (8 Cir., 1957), cert. den. 355 U. S. 890; *United States* v. *Vater*, 259 F. 2d 667, 672 (2 Cir., 1958); *Bird* v. *United States*, 241 F. 2d 516, 520 (1 Cir., 1957).

The primary reason for the refusal of an appellate court to consider an issue first raised on appeal is if the development of that issue requires a factual showing not presented by the record below (*Bird* v. *United States*, *supra*). Such is not the case here. What is here presented is an issue of law as to whether the cease and desist order is so vague and indefinite as to violate Petitioner's constitutional rights.

CONCLUSION

For the foregoing reason a writ of certiorari should be granted and the decree below should be reversed.

Respectfully submitted,

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APPENDIX

Opinion of United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 136—October Term, 1959

(Argued January 8, 1960 Decided March 4, 1960.)

Docket No. 25512

BANTAM BOOKS, INC.,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

Before:

LUMBARD, *Chief Judge*,
MOORE and FRIENDLY, *Circuit Judges*.

Petition to review an order of the Federal Trade Commission requiring petitioner to cease and desist from offering abridged or retitled books for sale unless clear notice of abridgment or retitling is given. Petition denied and order affirmed.

HORACE S. MANGES, New York, N. Y. (JACOB F. RASKIN and WEIL, GOTSHAL & MANGES, New York, N. Y., on the brief), for Petitioner.

ALAN B. HOBBES, Ass't General Counsel (DANIEL J. McCAULEY, Jr., General Counsel, and JNO. W. CARTER, Jr., Attorney, on the brief), for Federal Trade Commission, Respondent.

Opinion of United States Court of Appeals for the Second Circuit

FRIENDLY, *Circuit Judge*:

Bantam Books, Inc., a corporation carrying on business in New York, petitions under § 5 (c) of the Federal Trade Commission Act, 15 U. S. C. § 45 (c), that we review and set aside an order of the Federal Trade Commission directing petitioner, a large publisher of paperbound books, to cease and desist from offering for sale books that constitute abridgments or have been retitled except on printing certain notices as set forth in the margin.[1] In *Hillman Periodicals, Inc.* v. *FTC*, 174 F. 2d 122 (2d Cir. 1949), we affirmed a more rigorous order of the Commission dealing with a similar problem; the order here under review contains the more limited remedial provision which a majority required in *New American Library of World Literature, Inc.* v. *FTC*, 213 F. 2d 143 (2d Cir. 1954).

As the order indicates, two different types of republished paperbacks are involved—abridgments and books in full text but with a new title. Both types have a multi-colored glossy paper cover carrying an eye-catching

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[1] The order directs petitioner to cease and desist from

"1. Offering for sale or selling any abridged copy of a book unless one of the following words, 'abridged,' 'abridgment,' 'condensed' or 'condensation,' or some other word or phrase stating with equal clarity that said book is abridged, appears in clear, conspicuous type upon the front cover and upon the title page of the book, either in immediate connection with the title or in another position adapted readily to attract the attention of a prospective purchaser;

"2. Using or substituting a new title for, or in place of, the original title of a reprinted book unless a statement which reveals the original title of the book and that it has been previously published thereunder appears in clear and conspicuous type upon the front cover and upon the title page of the book, either in immediate connection with the title or in another position adapted readily to attract the attention of a prospective purchaser."

illustration. The title appears in large type near the middle of the cover. The name of the author is in smaller but still good-sized type, in varying positions. In most cases there is also a descriptive statement as to the book; this also in type smaller than the title but easy to read.

With one exception [2] all the abridgments carry on their cover a legend descriptive of that fact. This is at the bottom of the page, in type considerably smaller than the rest, and without use of upper and lower case. In some instances the legend is printed in part over colors that decrease its legibility, although in no instance is it illegible. No other notice of abridgment is given.

The covers of the books published under new titles also carry at the bottom a legend giving the original title of the book. As in the case of the abridgments, the type in this legend is much smaller than in the title and smaller also than in the other material on the cover; and at least in some instances, because of being printed over a part of the illustration or by virtue of the color combinations, it does not hit the eye, although in no case can we say it is illegible. In addition, notice of retitling is printed on a number of interior pages including the title page, the page bearing the copyright notice and sometimes a third page. Here also the type of the original title is considerably smaller than of the new title but is in no wise unreadable.

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[2] The exception was "The Count of Monte Cristo" by Alexandre Dumas. The cover stated this to be "A New Translation by Lowell Bair." No indication of abridgment was given on the cover or elsewhere, although in fact the translation contained less than a third as many words as the French original and there was other evidence of substantial deletion and condensation. The claim that the notice as to translation apprised the purchaser "that Petitioner's book is not an exact republication of an existing work" is unpersuasive; "translation" means a complete translation unless there is warning to the contrary.

The Commission introduced no evidence as to deception other than the books themselves and testimony as to the degree to which "The Count of Monte Cristo" (see fn. 2) was abridged. Petitioner offered the testimony of a psychologist. He testified as to the viewing habits of buyers of paperbacks based on some 1400 interviews. On the basis of this, he gave opinion testimony that the legends with respect to abridgment and retitling would "readily attract the attention of a prospective purchaser."

The Commission's trial examiner, J. Earl Cox, found that while "The more intelligent, more experienced, careful prospective buyer might well observe and comprehend the many legends, * * * many buyers would not glean the fact that some of these books had previously been published under different titles, or were abridgments, and would therefore be deceived." He therefore found that petitioner had engaged in "unfair or deceptive acts or practices in commerce" prohibited by § 5(a) of the Federal Trade Commission Act and should be ordered to cease and desist therefrom, in the language quoted above (footnote 1). The Commission affirmed.

Petitioner contends (1) that there was no substantial evidence to support the finding that it had engaged in "unfair or deceptive acts or practices in commerce," and (2) that the cease and desist order deprived it of due process of law because of the Commission's failure to promulgate a sufficiently clear standard as to what constitutes adequate disclosure. We find no merit in either contention.

(1) This Court held in *New American Library, Inc.* v. *FTC*, *supra*, that the Commission might lawfully find that a publisher had failed to give adequate notice of abridgment or change of title on the basis of an inspection of the books themselves without other evidence. While the disclosures made by petitioner would appear more nearly adequate than those in the cited case, we cannot hold the

Commission lacked basis for its finding here. It would be of no moment that we might think the legends sufficient for ourselves. Whether or not we are entitled to claim places in the Examiner's catagory of "the more intelligent, more experienced, careful prospective buyer," at least we are used to looking at books; and, what is more important, we necessarily examine petitioner's with eyes already alerted to the problem. Yet, with all this, we cannot escape the impression of subtle underplaying, at least on some covers. It is sufficient that we cannot say the Commission lacked a rational basis for its finding, and the order based thereon.

The Commission was not bound to accept the opinion evidence of petitioner's witness even though petitioner asserts this was uncontradicted. No real basis was laid for the expert's conclusion, the interviews having dealt generally with book-buying habits and having made no attempt to determine whether buyers of petitioner's books were actually deceived. Moreover, there was much in the witness' testimony that tended against his conclusion. He testified that "The range of time that the prospective purchaser is in physical or visual contact with the paper-bound book ranges from one minute to ten minutes" with the average approximtaely four; that the buyer "spends most of his time looking at the cover and he will look in general at the center of the page where he generally expects to find the title"; that "he will then look for the author, if it is a familiar author"; and that for this purpose he first looks at the top of the cover and only afterwards at the bottom. Most purchasers "will actually pick up the book and riffle through the pages," with no uniformity as to which pages are viewed and no tendency to look particularly at the pages where petitioner printed notice of retitling. The Trial Examiner was justified in finding that the attention of the one or two minute purchaser fol-

lowing this routine might not be attracted to the legends of abridgment or retitling, and the Commission's responsibilities extend to him and not simply to the "average" four minute buyer or the careful, indecisive or dilatory purchaser who takes ten. As was said in *General Motors Corp. v. Federal Trade Commission*, 114 F. 2d 33, 36 (2d Cir. 1940), cert. denied 312 U. S. 682 (1941):

> "But if the Commission, having discretion to deal with these matters, thinks it best to insist upon a form of advertising clear enough so that, in the words of the prophet Isaiah, 'wayfaring men, though fools, shall not err therein,' it is not for the courts to revise their judgment."

See *Charles of the Ritz Dist. Corp. v. FTC*, 143 F. 2d 676, 679 (2d Cir. 1944).

(2) Petitioner claims it cannot be required to comply with the Commission's order consistently with the due process clause of the Fifth Amendment, because of the Commission's failure to establish detailed standards of the disclosure required, citing *Smith v. California*, 80 Sup. Ct. 215, December 14, 1959, *Scull v. Virginia*, 359 U. S. 344, 353 (1959), and other cases. The Commission says petitioner may not be heard to argue this since, as the Commission alleges, the claim was not made before it. We find it unnecessary to pass on the Commission's contention in bar since we consider petitioner's claim unfounded on the merits. Petitioner's criticism relates especially to the requirement that the legends be printed "in clear, conspicuous type." The orders approved in *Hillman Periodicals v. FTC*, *supra*, and *New American Library v. FTC*, *supra*, contained those same words. It is by no means plain that more detailed specification by the Commission was feasible. What type is needed to give adequate notice of abridgment or retitling on a cover is not a constant but a variable, depending on

the color of the legend, its place, the size and color of the cover and other printed material, the presence or absence of illustrations, and other things. We shall not require the Commission to attempt to devise a universal formula that would take account of all these permutations, at least in the absence of evidence that compliance with the order as framed constitutes an undue burden.

The petitioner to review is denied and the Commission's order is affirmed and shall be complied with. 15 U. S. C. § 45(c).

MOORE, *Circuit Judge* (concurring in the result):

Were this case to come before me *de novo* my views would be entitled "dissenting" and not "concurring." However, to follow, and be consistent with, the decisions on the subject in this circuit,[1] I concur in the result. Nevertheless, although I am apparently a "voice of one crying in the wilderness" (to use—also for the purpose of consistency—the same prophet (Isaiah) as we have quoted before in this circuit (*General Motors Corp.* v. *Federal Trade Commission*, 2 Cir., 1940, 114 F. 2d 33, 36; cert. den. 312 U. S. 682 (1941)), I cannot accept the conclusion that the words "in clear, conspicuous type" convey a sufficiently clear standard as to what constitutes adequate disclosure so as to enable a publisher to understand what it is to do to comply either with the laws or the Commission's orders. Nor can I agree that a single trial examiner of the Commission without the aid of any testimony, expert or otherwise, is the one person in the entire judicial and quasi-judicial system best able to comprehend the approach of that non-

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[1] *Hillman Periodicals, Inc.* v. *Federal Trade Commission*, 2 Cir., 1940, 174 F. 2d 122; *New American Library of World Literature, Inc.* v. *Federal Trade Commission*, 2 Cir., 1954, 213 F. 2d 143.

existent character, the "average" reader, in his purchase of a "pocket" book.

Flattered momentarily by the majority's suggestion that judges may be more intelligent and experienced but quickly reduced in scale by the conclusion that it is "of no moment that we might think the legends sufficient for ourselves," I find myself trying to cope with the answer to "clear and conspicuous" to whom? Certainly they are to us because the majority concedes that the legends on the covers were "easy to read," were not "illegible" and "in no wise unreadable." These findings would naturally lead to the conclusion that the Commission's order has been adequately complied with. But how is the publisher to know? No standards for compliance have ever been suggested. No size of type is specified, no special colors are required, no particular location on the cover or inside pages is directed. Why should a trial examiner decide for or against compliance merely because he concludes that the publishers in printing their books should cater to "the one or two minute purchaser"? What intellectual level is the Commission serving or protecting? What physical impairments are to be honored? A 20-20 vision reader may well observe legends which those of us burdened with trifocal lenses would never see.[2] If full and complete understanding is to be the test, how does the Commission know that a "substantial portion" of readers comprehend the meaning of "unabridged" even if in one inch letters? Furthermore, if prevention of deception is the goal, how is it possible to

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[2] The trial examiner apparently sets his standard of clarity so that "he who runs may read." Is not our present pace of life sufficiently rapid that we do not have to add to it by forcing publishers of books to gear themselves to the running reader? If ever there is to be a moment for quiet reflection it might well be spent with a book reflectively selected and not snatched like a mail sack by a speeding mail train.

reconcile with the contents the lurid [3] chromo covers depicting an attractive young woman scantily attired about to meet her death, or suggestively "worse than." Disappointed purchasers will seldom discover their unfulfilled hopes in a one or two minutes riffling of a book at a newsstand or drug store.

The Commission argues that it is not "required to specify in detail 'what consitutes adequate disclosure of abridgment or of a change of title.'" I find this a rather cavalier attitude for a public agency to assume. In many fields it is difficult, in fact often impossible, to specify standards of unfair or deceptive acts or practices. These words frequently "do not admit of precise definition" (*Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643, 648 (1931)). Where this be the case, broad discretion should be granted to the Commission whose deservedly praiseworthy efforts act as an effectual protective buffer between an often misinformed and gullible public and merchants who for their own commercial advantage would exploit these characteristics by extravagant and unfounded representations. On the other hand where, as here, "clear and conspicuous" can be given more finite measurements, standards of type and print should not be kept vague and indefinite so as to make conformity with the Commission's orders a matter of guesswork by the publisher and possible whim and personal opinion by individual trial examiners.

Publishers about to print thousands of copies at considerable cost should not be put in this predicament of uncertainty. It matters little what the rules are so long as they are decreed with sufficient clarity that they may be followed. The same principle of consistency, however, applies here. For many years the position of this circuit

[3] Where the majority obtained "the impression of subtle underplaying, at least on some covers," I am at a loss to understand.

has been made known to publishers by our decisions.[4] The law has been stated and should be followed. Whether publishers should be forced with hat in hand to wait upon the Commission in advance of every publication and secure their approval of the format of each book is, in my opinion, highly questionable. But, as previously indicated, we have decided that these so-called standards (vague as I believe they are) are adequate, the law at least in this field is sufficiently definite and requires affirmance of the Commission's order.

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[4] See footnote 1, *supra*.

Final Decree Order Enforcing Order to Cease and Desist

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 25512

BANTAM BOOKS INC.,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

Bantam Books Inc., a corporation, petitioner, having filed in this Court on the 29th day of January 1959 its petition for the review of and to set aside an order to cease and desist issued against it on the 24th day of November 1958 by the Federal Trade Commission, respondent, in a proceeding before it, entitled "In the Matter of Bantam Books Inc., Docket No. 6802"; and a copy of said petition having been served upon the Commission; and the Commission having thereafter certified and filed in this Court, as required by the Federal Trade Commission Act, a transcript of the entire record in the proceeding which resulted in the said order to cease and desist; and the matter having been heard by this Court on briefs and oral argument; and this Court having thereafter rendered its decision on the 4th day of March 1960, denying the petition to set aside the order of the Commission, issued on the 24th day of November 1958, as aforesaid, and directing that petitioner obey and comply therewith:

Final Decree Order Enforcing Order to Cease and Desist

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the aforesaid petition to set aside the order of the Federal Trade Commission be, and it hereby is, denied; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the aforesaid order to cease and desist be, and it hereby is, affirmed; and that petitioner be, and it hereby is, commanded to obey and comply with the terms thereof.

Without prejudice to the right of the United States, as provided in Section 5 (1) of the Federal Trade Commission Act, to prosecute suits to recover civil penalties for violation of the aforesaid order to cease and desist, hereby enforced, this Court retains jurisdiction of this cause to enter such further orders herein from time to time as may become necessary effectively to enforce compliance in every respect with this decree and to prevent evasion thereof.

By the Court:

J. EDWARD LUMBARD,
HENRY J. FRIENDLY,
United States Circuit Judges.

Dated: March 21, 1960.

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Office-Supreme Court, U.S.
FILED
JUL 18 1960
JAMES R. BROWNING, Clerk

No. 156

In the Supreme Court of the United States

OCTOBER TERM, 1960

BANTAM BOOKS, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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INDEX

	Page
Opinions Below	1
Jurisdiction	1
Question Presented	2
Statute Involved	2
Statement	3
Argument	4
Conclusion	7

CITATIONS

Cases:

Consolidated Royal Chemical Corp. v. *Federal Trade Commission*, 191 F. 2d 896	6
Federal Trade Commission v. *Mandel Brothers*, 359 U.S. 385	6
Federal Trade Commission v. *Ruberoid Co.*, 343 U.S. 470	6
Helvering v. *Tex.-Penn Oil Co.*, 300 U.S. 481	4
Hillman Periodicals, Inc. v. *Federal Trade Commission*, 174 F. 2d 122	5
Hormel v. *Helvering*, 312 U.S. 552	4
Jacob Siegel v. *Federal Trade Commission*, 327 U.S. 608	6
McComb v. *Jacksonville Paper Co.*, 336 U.S. 187	7
Moog Industries, Inc. v. *Federal Trade Commission*, 355 U.S. 411	4
New America Library of World Literature, Inc. v. *Federal Trade Commission*, 213 F. 2d 143	5
United States v. *Crescent Amusement Co.*, 323 U.S. 173	6

Cases—Continued

	Page
United States v. *L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33	4
Zenith Radio Corp. v. *Federal Trade Commission*, 143 F. 2d 29	6
Statute:	
Federal Trade Commission Act, 38 Stat., as amended, 52 Stat. 111, 15 U.S.C. 41, *et seq.*, Section 5	2

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a)[1] is reported at 275 F. 2d 680. The opinion and order of the Federal Trade Commission (App. 8a-22a) have not yet been reported.

JURISDICTION

The decree of the court of appeals was entered on March 21, 1960 (Pet. App. 1a-12a). The petition for a writ of certiorari was filed on June 18, 1960. The jurisdiction of this court is invoked under 15 U.S.C. 45(c) and 28 U.S.C. 1254(1).

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[1] "Pet. App." refers to the appendix to the petition for writ of certiorari, and "App." to the appendix filed by petitioner in the court below.

QUESTION PRESENTED

The Federal Trade Commission found that petitioner's failure adequately to disclose on the cover of certain of its republished paperbound books that they were either abridgments or old books with a new title violated Section 5 of the Federal Trade Commission Act by tending to induce purchases of such books in the mistaken belief that they were complete and unabridged or were new and original publications. The sole question presented is whether the Commission's order forbidding petitioner to sell its abridged or retitled books without disclosing the facts "in clear, conspicuous type" in a "position adapted readily to attract the attention of a prospective purchaser" is void for vagueness.

STATUTE INVOLVED

The pertinent provisions of the Federal Trade Commission Act (38 Stat. 717, as amended by 52 Stat. 111–113, 15 U.S.C. 45) are as follows:

> *Section 5(a)*: Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful. * * *
>
> The Commission is empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.
>
> *Section 5(b)*: * * * If upon * * * hearing the Commission shall be of the opinion that the * * * act or practice in question is prohibited by this Act, it shall * * * issue and cause to be served * * * an order requiring

such person, partnership, or corporation to cease and desist from using such * * * act or practice.

STATEMENT

Petitioner is a New York corporation engaged in the business of selling and distributing paper-bound books in substantial quantities in interstate commerce. Between 1945, when petitioner commenced doing business, and the institution of this proceeding, it published and distributed over 1,100 different titles representing more than 350,000,000 books. Some of the books sold and distributed were abridgments, *i.e.*, reprints of books in which portions of the original text had been shortened or omitted. Others contained the full text of the original publication but were republished under a new title.

After full hearing upon the Commission's complaint charging unfair and deceptive acts and practices in commerce, the examiner found that in a number of instances cover statements as to abridgment or change of title were of such size, location or color[2] that they had "the tendency and capacity to lead a portion of the purchasing public into the mistaken and erroneous belief that said books are complete and unabridged, or are new and original publications, and to induce a substantial portion of said public to purchase respondent's said books because of said erroneous and mistaken belief" (App. 19a–20a). An order was entered forbidding petitioner to sell its abridged or retitled books unless

[2] In one instance, there was no disclosure that the book was abridged (App. 12a, 19a).

clear notice of the abridgment or retitling is given on the cover and title page "in clear and conspicuous type", "either in immediate connection with the title or in another position adapted readily to attract the attention of a prospective purchaser" (App. 20a–21a). The cease and desist order proposed by the examiner was adopted by the Commission (App. 21a–22a). The court of appeals affirmed (Pet. App. 1a).

ARGUMENT

The sole question raised by the petition is whether petitioner's rights have been violated because of the alleged vagueness of the Commission order requiring that adequate notice be given the public when petitioner publishes a reprint which is either abridged or retitled. Petitioner argues that the requirement that the notice be "in clear and conspicuous type" in a "position adapted readily to attract the attention of a prospective purchaser" is defective because it does not set forth a clear standard by which petitioner can determine whether a particular statement is sufficiently conspicuous. But, as the court below concluded (Pet. App. 6a), the argument that the broad discretion afforded petitioner to choose its own method of complying with the Commission's order deprives it of due process is "unfounded."[1]

[1] As the court below pointed out (Pet. App. 6a), there is also a serious question whether this issue was properly presented on appeal in view of the failure to raise the matter before the Commission on appeal from the examiner's opinion. See *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411, 414; *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 34–38; *Hormel* v. *Helvering*, 312 U.S. 552, 556; *Helvering* v. *Tex.-Penn Oil Co.*, 300 U.S. 481, 498.

Petitioner points to testimony, accepted by the examiner, indicating that as many as eleven separate "factors" or "characteristics" may be involved in determining whether a particular legend is adequate to attract attention (Pet. 7–8). But the existence of such variables does not, as petitioner suggests, lead to the conclusion that fixed regulations governing the permissible limits are either necessary or practicable. As the court of appeals observed (Pet. App. 6a), "[i]t is by no means plain that more detailed specification by the Commission was feasible. What type is needed to give adequate notice of abridgement or retitling on a cover is not a constant but a variable, depending upon the color of the legend, its place, the size and color of the cover and other printed material, the presence or absence of illustrations, and other things." Indeed, in a previous decision involving the identical problem the court of appeals held that an order requiring a publisher to locate the identifying legend "in immediate connection with the title" was too restrictive and that "both the public interest and the legitimate interests of the publisher could be sufficiently protected by a more flexible requirement." *New American Library of World Literature, Inc.* v. *Federal Trade Commission*, 213 F. 2d 143, 145–146 (C.A. 2). Whether or not the court's insistence upon such latitude was necessary (see *Hillman Periodicals Inc.* v. *Federal Trade Commission*, 174 F. 2d 122 (C.A. 2)), there can be no doubt that the order adopted by the Commission in the instant case was well within its discretionary authority to

formulate the nature of remedial relief. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473; *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 611; see *Zenith Radio Corp.* v. *Federal Trade Commission*, 143 F. 2d 29, 31 (C.A. 7); *Consolidated Royal Chemical Corp.* v. *Federal Trade Commission*, 191 F. 2d 896, 900 (C.A. 7).

Contrary to petitioner's suggestion, "[w]e do not have here the problem of a penal statute that deserves strict construction." *Federal Trade Commission* v. *Mandel Brothers*, 359 U.S. 385, 389. Cease and desist orders do not impose criminal punishment for past acts; they proscribe illegal practices for the future. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473. The fact that petitioner is subject to sanctions upon a showing of willful and knowing violation of the order does not mean that the Commission must attempt the impracticable task of spelling out in advance precise details as to the size or color of the type to be used or the other factors relevant to an adequate disclosure in particular cases. Cf. *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 188 (where a decree cannot as a practical matter be made more specific, its generality "is a burden which those who have violated the Act must carry"). Such constitutional rights as petitioner may have in protecting itself from sanctions in the face of a good-faith attempt to comply with the Commission order can be fully vindicated in subsequent enforcement actions.

The short of the matter is that petitioner has no legitimate interest in concealing from an unwary

buyer the fact that a book has been abridged or the fact that its title has been altered. The covers of paperback books are not always notable for the restraint with which they portray matter which the publisher may deem alluring to the prospective reader. Thus, one can scarcely credit the notion that the publisher will be at a loss in finding means which will adequately convey to the public information which the public is entitled to have. On the contrary, one may safely say that a publisher could have difficulty in complying with the Commission's direction in this case only if he should desire to skirt as closely as possible to the line. The courts do not sit to insure against such "a calculated risk," *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 193.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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